No. 83-461

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In The

Supreme Court of the United States

October Term, 1983

CLUB MEDITERRANEE, S.A., a Foreign Corporation,

Appellant,

vs.

MARJORIE SCHLOSSBERG DORIN and PHILIP DORIN,

Appellees.

On Appeal from the New York Supreme Court, Appellate Division, First Department

APPELLANT'S REPLY BRIEF

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No. 83-461

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PRELIMINARY STATEMENT

Club Mediterranee, S.A., the Appellant herein, pursuant to Supreme Court Rule 16, respectfully submits this memorandum in opposition to Appellees' Motion to Dismiss Appeal.

INTRODUCTION

Appellees, in support of their Motion to Dismiss have raised five grounds of objection against Appellant's appeal to this Court. Before addressing those contentions, however, it is necessary first to correct a number of potentially misleading assertions contained in Appellees' "Statement of the Case".

Appellees allege that Club Med, Inc., A New York corporation, is the "alter-ego" of Club Mediterranee, S.A. In footnote "1" at page 2 of their brief, Appellees note that Appellant had asserted that it does not maintain any office in the United States and that the relationship between it and Club Med, Inc. is one of principal and agent. Appellees stated further in such footnote that "[T]hese assertions have not been proven and, in fact, the complaint contains allegations to the contrary". It should be noted, that there is, of course, no burden of proof upon Club Mediterranee, S.A. to prove its assertions, but rather the burden of proof remains with the Appellees to prove their allegation that Club Med, Inc. is the "alter-ego" of Club Mediterranee, S.A.

Pursuant to its "alter-ego" theory, Appellees, throughout their brief, refer to Club Med, Inc. and Club Mediterranee, S.A. jointly as "Club Med". Obviously, Appellees' purpose is to blur the distinctions between the actions of two separate and distinct entities and to buttress its implied, but unfounded, position that in seeking discovery against Club Mediterranee, S.A. it is doing no more than seeking discovery against a domestic corporation.

Similarly, in an obvious attempt to booster their presentation of what they refer to as "Club Med's vigorous utilization of the CPLR" Appellees make reference to Club Med "utilizing" the CPLR "on behalf of its co-defendant Societe Generale" (*see* first full paragraph on page 4 of Appellees' brief). Neither Club Med, Inc. nor Club Mediterranee S.A. has utilized anything in the CPLR on behalf of Societe Generale. The facts of the matter are that all three corporations are represented by the same law firm and that, clearly, any actions taken by Societe Generale against the Appellees is completely separate and irrelevant to the actions taken by Club Mediterranee S.A. The statements contained in that paragraph are inaccurate with respect to Club Mediterranee S.A.'s use of the CPLR in this litigation.

An allegation of questionable propriety on the part of the Appellees occurs in footnote (2) on page 3 of Appellees' brief. There it is alleged that Appellant is seeking "to evade its responsibilties and obligations of appearing in local courts and cooperating with local court rules with regard to discovery". Such statement is clearly unnecessary and abusive inasmuch as the Appellees admit on the same page that Club Mediterranee S.A., "did not challenge service or jurisdiction". (Appellees' Brief p.

3). Club Mediterranee S.A. has contrary to Appellees' allegations, in fact, appeared without protest in the local courts below and has constantly tendered its cooperation with regard to discovery, insisting only, however, that such discovery be conducted in accordance with the Hague Evidence Convention.

In summary, contrary to the assertions of Appellees, Club Mediterranee S.A. has from the inception of this litigation presented itself as a separate, French entity, related by agency to Club Med, Inc. and completely unrelated to Societe Generale. It has no standing with respect to any litigation between Appellees and Societe Generale. Similarly, it has sought to evade no responsibility, but has appeared voluntarily and cooperated fully, short of violating the Hague Evidence Convention and French internal and penal law.

ARGUMENT

I.

Appellees are free to conduct discovery in accordance with the CPLR with respect to any information not within the control of Club Mediterranee, S.A. in France.

The Appellant fails to understand what the Appellees are attempting to say in their first point of their brief. At no time during this litigation has the Appellant ever taken the position that information located outside the possession of Club Mediterranee S.A. in France was not discoverable. The Appellant had throughout this litigation alleged that Club Med, Inc. is a New York corporation and subject to the CPLR. If there is any information within the control of Club Med, Inc. located in New York then the Appellees are free to seek such relevant information in accordance with procedures of the CPLR. The Appellant has never disputed this and does not dispute this now.

The Appellant's sole objection is to any discovery being sought from it in France in a form not in accord with the Hague Evidence Convention. The interrogatories subject to this appeal were not served on any other defendant but were specifically served upon Club Mediterranee S.A. The simple fact of the matter is that the information (and descriptions of allegedly relevant documents) being sought from Club Mediterranee S.A. would

be so provided by Club Mediterranee S.A. in France. Interrogatory Number "1" asks Club Mediterranee to "State the name, address, position and title of the person answering these interrogatories". Who does counsel for the Appellees think is going to answer, under oath, such interrogatories? Clearly it would be an officer and/or director of Club Mediterranee S.A. in France.

Accordingly, Appellees' allegation that Appellant has failed to "factually demonstrate that Appellees' interrogatories require an investigation in French territory [or] involve obtaining evidence of French nationals on French soil" is absurd on its face. Club Mediterranee S.A. is located in France, a French national would be required to answer and verify the interrogatories so served upon Club Mediterranee S.A. and French nationals would be obviously involved in the search for, identification and production of any documents in an internal document production conducted by Club Mediterranee S.A. in response to such interrogatories.

Similarly, Appellees' allegation that the "trial court expressly found that Appellant had failed to meet this factual burden" is without merit. The trial court made no such express ruling. The order of the trial court (Jurisdictional Statement Appendix pp. 5a-6a) seems to interpret the letter of the French Ministry of Justice (Jurisdictional Statement Appendix pp. 93a-96a) as indicating that the Hague Evidence Convention only applies where the discovery proceeding itself would physically take place within French territory. This requirement would, of course, strip the Hague Evidence Convention of any effect since in virtually every situation opposing counsel would simply demand that the information, documents or individuals located in the foreign country be transported to the country of the situs of the discovery proceedings. Quite obviously, the intent of the Hague Evidence Convention was to enact certain procedures for the taking of pre-trial evidence where the discovery *material* is located in said foreign country, not the discovery proceeding.

II.

Appellant need not seek a waiver of penal sanctions for the illegal disclosure of evidentiary materials.

Appellees, recognizing the applicability of French penal law to the proposed illegal disclosure of evidentiary materials by a

French national, Club Mediterranee S.A., has put forth the astounding contention that even though Appellant is a defendant below and even though no formal or informal discovery request has ever been made by the Appellees to the judicial authorities of France, Appellant has the affirmative duty nonetheless of seeking a waiver of criminal sanctions that its country has imposed for participation in illegal disclosure of evidentiary materials. (Presumably such a transmittal to and review of the interrogatories by the appropriate judicial authorities in France, as well as their decision regarding a "waiver" would be required to be completed within the fifteen (15) days as specified in the interrogatories in question).

In support of this argument, Appellees rely upon four cases; *Societe Internationale v. Rogers,* 357 U.S. 197 (1957); *In re Westinghouse Electric Corp.,* 563 F. 2d 992 (10th Cir. 1977); *Arthur Andersen v. Finesilver,* 546 F. 2d 338 (10th Cir. 1976), *cert. denied,* 429 U.S. 1096 (1977); and *Ghana Supply Commission v. New England Power Company,* 83 F.R.D. 586 (D. Mass. 1979). These cases are totally inapplicable to and distinguishable from the issues at bar.

Firstly, three of the above four cases[1] involved situations where purportedly foreign entities were suing as plaintiffs, thus affirmatively exposing themselves to the judicial processes of particular American courts. The case of *Ghana Supply Commission, supra,* dealt directly with this fact when it stated,

> "we conclude that the [plaintiff] . . . by instituting this civil action . . . has waived any privilege it might have otherwise had to prevent disclosure of information . . . " 483 F.R.D. at 594.

Secondly, none of these cases dealt with an international treaty such as the one at bar in which the United States government, in association with other nations, approved and adopted a specific procedure for pre-trial discovery of evidentiary information in litigation involving multi-national parties. The Hague Evidence Convention, as previously noted, is not a discretionary statute

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1. *Arthur Andersen & Co. v. Finesilver, supra,* excepted.

and it is not a "foreign" law.[2] It is a federal law (28 U.S.C. Section 1781) mandating compliance by the plaintiffs herein.

Thirdly, the Supreme Court expressly recognized the validity of non-compliance in the face of penal sanctions in *Societe International v. Rogers, supra,* when it reversed the lower court's dismissal of petitioner's complaint, and stated

> "It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for non-production, and this excuse is not weakened because of laws preventing compliance are those of a foreign sovereign . . . . Here . . . the very fact of compliance by disclosure . . . will constitute the initial violation of Swiss laws." 357 U.S. at 211.

And finally, in the *Westinghouse* case, *supra,* even though the party seeking access to information located abroad was the defendant, it still attempted to comply with basic international discovery procedures by the service of letters rogatory upon the Canadian government. (Thus giving the judicial authorities in that country the appropriate opportunity to review the issues.) Here, there has been no effort by the Appellees to comply with the requirements of the aforesaid international and federal law.

III.

Appellees have selectively interpreted Article 27 of the Hague Evidence Convention.

The transcenient theme of Appellees' brief in support of their position to completely abrogate the terms and requirements of the Hague Evidence Convention is that the application of this international treaty and federal law by local courts here (and presumably abroad) is "discretionary." To justify this position, portions of Article 27 of the Hague Evidence Convention are cited. But coincidentally, and quite intentionally, subsection (a), which explains the intent of this provision, was not cited. It states:

> "The provisions of the present Convention shall not prevent a contracting state from

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2. In *Arthur Andersen & Co. v. Finesilver, supra*, the Court expressly ruled only that "[F]oreign law may not control local law", 546 F.2d at 342. A question of *federal* law v. local law was not presented to the Court.

(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;"

The obvious purpose of this provision is to permit signatory nations in which discovery materials or information is being sought (*i.e.*, France, herein) the opportunity to allow alternative methods for the taking of such evidence, if they so choose. It does not, and certainly cannot logically mean — as Appellees attempt to show — that a local court, in which a request for discovery originates (*i.e.*, the United States herein) can dictate the required "alternative" procedure that the judicial authorities in France must follow. To interpret this provision in such a way would quite clearly destroy the very essence of this treaty which was adopted and exacted as law by our government in recognition of the legitimate interests that foreign nations have in their judicial processes.

The Court's attention is directed to the fact that Appellees' interpretation is a sword that cuts both ways. By summarily annulling the essential provisions of this treaty, American domiciliaries which may do or transact some business abroad (or are otherwise subject to the jurisdiction of a foreign court) will become subject as well to the whims, vagaries and uncertainties of local discovery rules throughout the world — the very situation this treaty was intended to prevent.

The application of Article 27 to the facts and circumstances herein would permit the Republic of France to exercise discretion, if it so chooses, in its method of supplying requested evidentiary materials and information. It is obvious, however, that the judicial authorities therein cannot be expected to exercise any discretion where they have received no request, nor where there has been even the slightest pretense made by the Appellees to appropriately request the evidentiary material being sought.

Appellees' reliance on Article 27 is misplaced and totally without merit.[3]

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3. Appellees' reference to *Volkswagenwerk v. Superior Court*, 123 Cal. App.3d, 840, 176 Cal.Rptr. 874 (1981) is hardly authority for the proposition that the Hague Evidence Convention is "discretionary." First, the opinion is

(Cont'd)

IV.

Implementation of the CPLR does not waive one's rights under federal law.

Appellees advance the position that by virtue of the lower court's *in personam* jurisdiction over Club Mediterranee S.A., Appellant's rights under other, unrelated, but equally applicable federal law have been waived or are now subject to an estoppel. This position is, both erroneous and untenable.

The Hague Evidence Convention is separate and apart from any statutes or laws governing jurisdiction. It, in fact, presumes that personal jurisdiction has already been established over a defendant. That Club Mediterranee S.A. is a French corporation is uncontested by the Appellees. Accordingly, in seeking discovery against such French entity, the provisions of the aforesaid treaty are applicable and binding upon the Appellees. The case at bar is, in fact, the very type of case envisioned by the drafters of The Hague Convention.

As a corporation being sued in the courts of New York, Club Mediterranee S.A., had every right, duty and obligation to enter

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(Cont'd)

not, as Appellees state, a California Supreme Court opinion, but rather is an opinion of the California Court of Appeals, First District. Second, the cited paragraph is mere *dicta*. Third, and most importantly, as demonstrated above, the substance of the cited paragraph is simply wrong. The Court's reference to Article 27 is nothing more than an inartful attempt to avoid deciding a constitutional issue. Finally, the opinion itself is authority for the proposition that Appellees' refusal to even attempt to comply with the Hague Evidence Convention is also wrong: "If the initial discovery order is to be validated, and if consideration of conflicts of sovereignty is to be postponed until after the responding party has failed to give the order of discovery, then at least the initial discovery order must appear to take into account the ascertainable requirements of the foreign state and to adopt those procedures which are least likely to offend that state's sovereignty . . . [B]ut if a channel more apt to elicit cooperation of a foreign government is plainly available but is not used, then in our view the insufficient account of the requirements of international comity had been taken and the order should be set aside in the first instance. [H]ere, the Hague Convention provides an obvious and preferable alternative means of obtaining evidence from within West Germany." 123 Cal.App.3d at 858. Indeed, the Court concluded that "the Trial Court in the exercise of judicial restraint based on international comity should have declined to proceed other than under the Hague Convention . . ." *Id.* at 859.

an appearance and demand the particulars of the claims levied against it. The Appellees are residents of New York State who have chosen the forum and, thus, are subject to all of the provisions of the New York civil practice statutes with respect to pre-trial discovery proceedings. The Appellant is not a New York State resident. It is a foreign, international corporation which has not affirmatively sought the jurisdiction of the courts of New York and has in no way waived any of its rights by merely defending an action brought against them here. If a foreign party, subject to the terms of the Hague Evidence Convention, waives those rights by simply entering an appropriate defense, then the treaty would be meaningless and illusory. Such a "Catch-22" situation cannot be the intent of this law and should, respectfully, not be created or sanctioned by an affirmance of the New York courts below.

The central theme underlying the contentions of Appellees' counsel in the litigation of this issue is that it is "unfair" that the parties herein are subject to different rules regulating pre-trial discovery. It may be considered equally unfair that the Appellant, a French corporation, may be sued in the courts of New York for an incident which allegedly occurred in a *foreign country*. Nevertheless, the same principle of law which has created the availability of jurisdiction in New York State over such Appellant, has also resulted in the establishment of an accepted procedure for the litigation of the case. Contrary to Appellees' assertions, it is the Appellees who are seeking the best of both worlds: jurisdiction over a foreign defendant without the statutory mandates attendant therewith.

V.

Appellees' position that this Court has no jurisdiction over this appeal is without merit.

Clearly, a state court rule may be deemed a state "statute" for Section 1257(2) purposes. *In re Griffiths,* 413 U.S. 717 (1973). In addition, the "validity" of a state statute is also said to have been sustained, within the meaning of Section 1257(2), when the state court holds the statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds. *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282 (1921); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58,

61, n.3 (1963); *Cohen v. California,* 403 U.S. 15, 17-18 (1971). Clearly, such is the case with this appeal.

Appellees' contention that the Appellant did not "make specific and plain . . . [its] contention that the application of the [CPLR] to [its] particular circumstances would make the [CPLR] void under Federal law" is absurd on its face. In the affirmation of Christopher W. Chan, Esq., submitted as part of Appellant's original motion to strike Appellees' interrogatories, Mr. Chan stated as the "BASIS FOR MOTION" as follows:

> "As the annexed Memorandum of Law indicates, the aforesaid interrogatories are barred pursuant to International Law and Treaty, French, Criminal and Civil Law, as well as Laws in the United States and New York Civil Practice Law and Rules."

(*See* page 4a of Appellees' brief.)

In the memorandum of law accompanying Mr. Chan's affirmation (which was *not* included in the appendix to Appellees' brief), the first point presented was that the discovery proceedings were governed by the provisions of the Hague Evidence Convention on the basis that it was the "supreme law of the land", pursuant to Article 6, Clause 2 of the United States Constitution.[4] (*See* pages 1a-2a *infra.*) As Appellees concede, Appellant further raised such issue in one of the "questions" which Appellees sought to have certified by the Appellate Division of the Supreme Court of the State of New York. (*See* Jurisdictional Statement Appendix at 102a-124a.)

Finally, it should have been noted that in the context of Section 1257(2), an appeal will lie even if the state court is not explicit in overruling a timely challenge, on federal grounds, to the validity of a state statute, so long as the challenge itself is explicit. *See Largent v. Texas,* 318 U.S. 418 (1943). As long as the statute is sustained, the Court has necessarily rejected such an objection. Its silence in this respect is immaterial and cannot

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4. Similarly, the Appellant's first point in its brief to the Appellate Division of the Supreme Court of the State of New York on its initial appeal raised the same issue and cited the same law. (*See* pages 15a-16a, *infru.*)

destroy the right to appeal under Section 1257(2). *See* Stern & Gressman, *Supreme Court Practice,* Fifth Edition, Section 3.4 at p. 163.

CONCLUSION

WHEREFORE, the Appellant respectfully submits that Appellees' motion to dismiss this appeal should be, in all respects, denied.

Respectfully submitted,

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APPENDIX

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT CLUB MEDITERRANEE S.A.'S MOTION FOR A PROTECTIVE ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MARJORIE SCHLOSSBERG DORIN and PHILIP A. DORIN

Plaintiffs,

-against-

CLUB MEDITERRANEE, S.A., CLUB MED, INC., CELEBRITY TRAVEL SERVICE, LTD., KENT TRAVEL SERVICE, INC., SOCIETE GENERALE and NATIONAL UNION FIRE INSURANCE,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT, DEFENDANT, CLUB MEDITERRANEE, S.A.'s MOTION FOR A PROTECTIVE ORDER

The facts have been adequately set forth in the moving papers. Suffice it to say, defendant, CLUB MEDITERRANEE, S.A., moves for a protective order pursuant to CPLR §3133, striking plaintiffs' interrogatories.

POINT I

Discovery Proceedings as Issues Herein Are Governed by the Provisions of The Hague Convention.

Memorandum of Law

The United States and France are parties to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force for the United States October 7, 1972; entered into force for France April 9, 1975) (the "Hague Convention"),[1] a copy of which is annexed hereto as Exhibit "A".

This international treaty, as its name implies, was adopted specifically for the purpose of regulating and administering the process of taking evidence in civil cases such as the one at bar. The provisions of this treaty, of course, supercede and take precedence over any possibly conflicting state law. See *Rosman v. Trans-World Airlines Inc.*, 34 N.Y. 2d 393, 358 N.Y.S. 2d 97 wherein the Court of Appeals stated, "It [a similar treaty adopted and approved by the United States Government] is the supreme law of the land (U.S. Const., Art. VI, cl. 2) of which New York courts are required to take judicial notice (CPLR 4511, subd. [a] Consol. Laws, c. 8) 358 N.Y.S. 2d as 103. See also, *Low v.. Bayerische Motoren Werke, A.G.*, 449 N.Y.S. 2d 733 (A.D. 1st Dep't., 1982).

POINT II

Plaintiffs' Interrogatories Are a Nullity as a Result of both Defective Form and Improper Service.

The Hague Convention contemplates that when evidence in a judicial proceeding is sought to be obtained by a party in one

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1. The Hague Convention and the Reservations thereto made by the contracting states may be found in 6 Martindale-Hubbell 4628-39 (1982). The Convention text, without the Reservations, may also be found in the notes to 28 U.S.C.A. §1781 (West Supp. 1981).

signatory country from a party in another signatory country, a judicial authority of the country from which the inquiry initiates (the Department of Justice in the United States) shall prepare a letter of request (in the United States called a letter rogatory) which "shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of the State." Convention Art. 2.

Pursuant to the specific requirements of the French government, expressly noted in the convention, letters rogatory seeking pre-trial disclosure of evidence must be sent to the French Ministry of Justice, Civil Division of International Judicial Assistance, which has been designated as the Central Authority, to the exclusion of all others. Moreover, letters of request must specify certain items mentioned in Article 3 of the Convention and must be in French or be accompanied by a certified translation in French. Art. 4 and Reservation thereto. There is no question that this is the method which must be followed under the terms of the Convention. A recommended model for such letters of request is attached to the end of the Convention text.

POINT III

Request for Documents Cannot Be Used Against French Corporations By United States Plaintiff

Letters of request are the sole means of judicial discovery directed by a United States plaintiff against a French defendant. France, by its Reservation to the Convention, accepted by the United States, has made it clear that "it will not execute Letters of Request for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." Reservation to Art. 23 of the Convention.

Memorandum of Law

By directing document requests to CLUB MEDITERRANEE, S.A., the plaintiffs have attempted to ride roughshod over the Convention. Plaintiffs' efforts to require CLUB MEDITERRANEE, S.A. to answer the Interrogatories must be denied on this second ground with respect to discovery of documents.

POINT IV

CLUB MEDITERRANEE, S.A. Would Violate French Criminal Law By Answering Interrogatories

French law[2] makes it a crime for CLUB MEDITERRANEE, S.A. to answer the Interrogatories:

> Art. 1 bis. Subject to treaties or international agreements and to the laws and regulations in force, every person is forbidden . . . to communicate, in writing, orally or in any other manner, documents or information of an economic, commercial, industrial, financial or technical nature intended to serve as evidence in foreign judicial . . . proceedings. . . .

Law No. 80-538 of July 16, 1980 (the "Act"), as translated in Parker School Studies in Foreign and Comparative Law, Columbia University, *French Law: Constitution and Selective Legislation* 8-49 to 50 (1981), annexed hereto as Exhibit "B", original version at II.9. Appendice au Code de Commerce, Petits Codes Dalloz (soixante-seizieme ed. 1980-81), annexed hereto as Exhibit "C". Perusal of the questions and requests for documents in the

2. The issue of foreign law is raised here in accordance with CPLR §4511(b).

Interrogatories demonstrates that virtually all the information sought with respect to the ownership, construction and operation of his business enterprise is of an "economic, commercial, industrial, financial or technical nature" within the meaning to the Act.

Violation of the act by an officer or agent of CLUB MEDITERRANEE, S.A. could result in imprisonment of up to six months and a fine of 120,000 francs. Under long-standing principles of international law, CLUB MEDITERRANEE, S.A. should not be ordered by an American court to violate French Law, particularly where it is the penal law of France that is at issue. *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-A-Mousson,* 636 F.2d 1300, 1327 n. 150 (D.D.C. 1980) ("Principles of international comity require that domestic courts not take action that may cause the violation of another nation's law."); *Volkswagenwerk A.G. v. Superior Court,* 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981) (following discovery methods of Convention for discovery against West German corporation); *Frummer v. Hilton Hotels International, Inc.,* 60 Misc.2d 840, 304 N.Y.S. 2d 335 (S.CT. Kings Co., 1969) (English law of negligence held applicable in personal injury suit).

The possible imposition of criminal liability against CLUB MEDITERRANEE, S.A. for its production of documents and other information sought by the plaintiffs provides a further basis upon which to deny plaintiffs' demands and inquiries as set forth in the Interrogatories in question.

POINT V

The Hague Convention Bars Discovery That Is Illegal Under French Law

Memorandum of Law

The Hague Convention states that if a country's laws prohibit a person of that country from divulging certain information, then the person cannot be required to produce that information:

> The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed. . . . In the execution of a Letter of Request the person concerned may refuse to give evidence insofar as he has a privilege or duty to refuse to give the evidence . . . under the laws of the state of execution. . . .

Arts. 9 and 11.

Since the international treaty in question expressly recognizes the rights of foreign corporations under the laws of their national domicile, this court is respectfully barred from ordering compliance to plaintiffs' demands.

POINT VI

Plaintiffs' Interrogatories Exceed the Permissable Area of Inquiry Under New York State Law

CPLR §3101 requires disclosure of evidence which is "material and necessary" in the prosecution or defense of an action. Even if the inquiries posed to CLUB MEDITERRANEE, S.A. were not blatantly defective both substantively and procedurally under international and federal law binding upon this Court, they would still be beyond the scope of permissable discovery under New York State law.

Memorandum of Law

Plaintiffs are alleging that Marjorie Dorin sustained a type of gastrointentinal illness during a one week vacation at defendant's facility in Haiti.

A review of their Interrogatories reveals that they seek information that is far beyond the scope of relevant inquiry.

It is clear, therefore, that review of the Interrogatories propounded to defendant CLUB MEDITERRANEE, S.A. reveal that they violate not only national and international law, but New York State law as well.

POINT VII

Summary Of Law

The Hague Convention is an international treaty that has been adopted, approved and signed by the governments of both France and the United States. As such, it has become the law of our nation (28 U.S.C. §1781) and binding upon the states. The effect of this Convention as well as the French Code of Civil Procedure upon discovery by a United States plaintiff directed toward a French defendant has been carefully analyzed in a letter from the French Ministry of Justice to the United States Department of Justice, Office of Foreign Litigation, dated March 9, 1981 (Department of State translation), annexed hereto as Exhibit "D", which provides:

> [T]he only two methods of investigation in French territory that may be ordered by foreign legal authorities, subject to the conditions established by these instruments, are letters of request [i.e., letters rogatory] and taking of evidence by diplomatic officers, consular agents, and

commissioners (Chapters I and II of The Hague Convention of March 18, 1970, and Articles 733 *et sec.* of the new French Code of Civil Procedure). Notwithstanding the agreement between the parties, Article 1 bis of the law of July 16, 1980 prevents recourse in French territory to any other methods of investigation or procedure for taking of evidence that in considered unlawful, *particularly recourse to requests for direct disclosure of documents or information.*

Moreover, Article 1 bis makes it possible to punish violations of the conditions established in The Hague Convention and in the declaration which the French government made at the time of ratification of this instrument for the execution of letters of request and the taking of evidence by commissioners.

Therefore, the Law of July 16, 1980, has given full effect to our relations of judicial cooperation by assuring improved implementation of the provisions of The Hague Convention of March 18, 1970 and by enabling American litigants to obtain evidence in France, by methods that are in conformity with the international commitments of our two countries, for use in judicial proceedings in the United States.

(Emphasis added.)

The letter from the French Ministry of Justice aptly summarizes two salient points. First, there are avenues available for discovery, if plaintiffs are willing to abide by them. Second,

France is adamant that the prescribed procedures be followed and will impose criminal penalties upon French nationals who might otherwise be inclined to ignore the established procedures. Plaintiffs herein appear intent on ignoring the clear directives of the Hague Convention.

It would, most respectfully, be unjust for this Court to ignore the requirements imposed by international and federal law and order compliance by defendant CLUB MEDITERRANEE, S.A., with the illegal discovery propounded by the plaintiffs.

CONCLUSION

It is respectfully requested, therefore, that plaintiffs' Interrogatories to defendant CLUB MEDITERRANEE, S.A. be stricken and that plaintiffs hereafter be compelled to comply with the relevant provisions of the Hague Convention in proceeding with the pre-trial disclosure herein.

Respectfully submitted,

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On the Brief

Memorandum of Law

EXHIBITS ANNEXED TO FOREGOING MEMORANDUM ARE OMITTED

BRIEF FOR DEFENDANT-APPELLANT CLUB MEDITERRANEE, S.A.

To be argued by
ROBERT STEIN

NEW YORK SUPREME COURT

Appellate Division - First Department

MARJORIE SCHLOSSBERG DORIN and PHILIP A. DORIN

Plaintiffs-Respondents,

-against-

CLUB MEDITERRANEE, S.A.,

Defendant-Appellant,

-and-

CLUB MED, INC., CELEBRITY TRAVEL SERVICE, LTD., KENT TRAVEL SERVICE, INC., SOCIETE GENERALE and NATIONAL UNION FIRE INSURANCE,

Defendants.

BRIEF FOR DEFENDANT APPELLANT

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Brief

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Brief

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT

Index No. 4777/82

MARJORIE SCHLOSSBERG DORIN and PHILIP A. DORIN

Plaintiffs-Respondents,

-against-

CLUB MEDITERRANEE, S.A.,

Defendants-Appellants.

-and-

CLUB MED, INC., SOCIETE GENERALE, CELEBRITY TRAVEL SERVICE, LTD. and KENT TRAVEL SERVICE, INC. and NATIONAL UNION FIRE INSURANCE,

Defendants.

BRIEF OF DEFENDANT-APPELLANT CLUB MEDITERRANEE, S.A.

PRELIMINARY STATEMENT

This is an appeal from an order of the Hon. Justice Stanley Parness dated January 5, 1983, denying in part the motion of the defendant CLUB MEDITERRANEE, S.A., which sought a protective order with respect to interrogatories propounded by plaintiffs on said defendant.

Brief

FACTS

Plaintiffs have brought this action against defendant/appellant CLUB MEDITERRANEE, S.A., among others, for personal injuries allegedly sustained by MARJORIE SCHLOSSBERG DORIN while she was a guest at a Club Med resort in the Republic of Haiti during the period between December 26, 1982 and January 2, 1982. CLUB MEDITERRANEE, S.A. has denied all of the material allegations of the complaint and has raised various affirmative defenses and cross-claims in its answer. Copies of the pleadings are annexed in the record. (pp. 6-29).

CLUB MEDITERRANEE, S.A. is a French corporation, duly existing pursuant and subject to the laws of France, including, but not limited to, those international treaties and conventions to which France is a signatory. Said defendant is not incorporated anywhere within the United States nor does it maintain any offices in this country for the purpose of its ownership, operation and/or control of the resort in question.

In personam jurisdiction has not been contested by the aforesaid defendant in this legal action.

In or about September of 1982, plaintiffs' counsel served the set of interrogatories in question directly upon the undersigned firm as counsel for CLUB MEDITERRANEE, S.A. in clear contravention to the terms and requirements of the Hague Evidence Convention, *infra.* (pp. 78-89). The within motion for a protective order was made by the appellant in Special Term, Part I of the Supreme Court, New York County and it is the decision and order of the Hon. Stanley Parness pursuant to that motion which is the subject of the instant appeal.

Brief

QUESTION PRESENTED

Are the interrogatories propounded by plaintiffs in contravention of and prohibited by the terms of the Hague Evidence Convention?

ARGUMENT

POINT I

Discovery Proceedings Herein Against CLUB MEDITERRANEE, S.A. Are Regulated by the Provisions of the Hague Evidence Convention.

The United States and France are parties to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature March 18, 1970, U.S.T. 2555, T.I.A.S. No. 7444 (entered into force for the United States on October 7, 1972; entered into force for France on April 9, 1975) (the "Hague Evidence Convention"),[1] a copy of which is annexed in the Record. (pp. 78-89).

This international treaty, as its name implies, was adopted specifically for the purpose of regulating and administering the process of taking evidence in civil cases such as the one at bar. Prior thereto the clash between pre-trial discovery procedures in common law nations such as the United States and Civil Law nations such as the Republic of France often led to intractable

1. The Hague Convention and the Reservations thereto made by the contracting states may be found in 6 Martindale-Hubbell 4628-39 (1982). The Convention text, without the Reservations, may also be found in the notes to 28 U.S.C.A. Section 1781 (West Supp. 1981).

situations in civil litigation involving parties of both nations. American draftsmen played a leading role among the twenty-five nations which participated in the drafting of the Convention, and it presently is in force between the United States and nine other countries with which American litigants often are involved, including Britain, France, the Scandinavian nations, Czechoslovakia and Portugal.[2]

The provisions of this treaty, of course, supercede and take precedence over any possibly conflicting state law. See *Rosman v. Trans-World Airlines, Inc.*, 34 N.Y.2d 393, 358 N.Y.S.2d 97 wherein the Court of Appeals stated, "It [a similar treaty adopted and approved by the United States Government] is the supreme law of the land (U.S. Const., Art. VI, cl. 2) of which New York courts are required to take judicial notice (CPLR 4511, subd. [a] Consol. Laws, c. 8) 358 N.Y.S.2d at 103. See also, *Low v. Bayerische Motoren Werke, A.G.*, 449 N.Y.S.2d 733 (A.D. 1st Dep't. 1982).

POINT II

Plaintiffs' Interrogatories are a Nullity Pursuant to the Provisions of the Hague Evidence Convention

The Hague Evidence Convention requires that when evidence in a judicial proceeding is sought to be obtained by a party in one signatory country from a party in another signatory country, a judicial authority of the country from which the inquiry initiates (the Department of Justice in the United States) shall prepare

2. See, International Lawyer, Vol. 13, "Existing Rules and Procedures," by James H. Carter, p. 10.

a letter of request (in the United States called a letter rogatory) which "shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of the State." Convention Art. 2.

Pursuant to the specific requirements of the French government, expressly noted in the convention, such letters of request seeking pre-trial disclosure of evidence must be sent to the French Ministry of Justice, Civil Division of International Judicial Assistance, which has been designated as the Central Authority, to the exclusion of all others. Moreover, letters of request must specify certain items mentioned in Article 3 of the Convention and must be in French or be accompanied by a certified translation in French. Art. 4 and Reservation thereto. There is no question that letters of request are the sole means of judicial discovery which must be followed under the terms of the Convention. A recommended model for such letters of request is attached to the end of the Convention text.

By directing document requests and interrogatories to counsel for CLUB MEDITERRANEE, S.A. in their present form, plaintiffs have completely ignored the clear provisions of binding international and national law.

One of the few cases discussing the interpreting the Hague Evidence Convention with respect to conflicting American procedural law was that of *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App.3d 840, 176 Cal. Rptr. 874 (1981). This case involved a personal injury action arising out of a motor vehicle collision. One of the vehicles was manufactured by the appellant therein. Plaintiff's claim was that the vehicle in question was defectively designed. The California appellate court, while recognizing their appropriate jurisdiction over the appellant nevertheless reversed the pre-trial discovery order of the lower

court and strictly enforced the requirements under the Hague Evidence Convention. The court stated,

> ". . .in cases such as this American courts traditionally and properly recognize the countervailing force of international comity: The concept that the courts of one sovereign state should not, as a matter of sound international relations, require acts of forebearances within the territory, and inconsistent with the internal laws, of another sovereign state unless a careful weighing of competing interests and alternative means makes clear that the order is justified. Rulings based on this concept of internationa! comity are dictated not by technical principles of jurisdiction of the parties to or subject-matter of particular lawsuits, but rather by exercise of judicial self-restraint in furtherance of policy considerations which transcend individual lawsuits. (Cf. Rest.2d Foreign Foreign Relations Law of the United States, Sections 39-40.) Particularized to discovery matters it is (as VWAG 1973 recognized) 'a policy of avoiding international discovery methods productive of friction with the procedures of host nations.' (VWAG 1973, supra, 33 Cal.App.2d at p.508, 109 Cal.Rptr. 219.) 123 Cal.App.3d at 858, 176 Cal.Rptr. at 884.

The court goes on to state:

> "[A]t least the initial discovery order must appear to take into account the ascertainable requirements of the foreign state and to adopt those procedures which are least likely to offend

> that state's sovereignty. . . .[I]f a channel more apt to elicit the cooperation of the foreign government is plainly available but is not used, then in our view the insufficient comity had been taken and the [discovery] order should be set aside in the first instance.
>
> Here the Hague Convention provides an obvious and preferable alternative means of obtaining evidence . . . ." 176 Cal.Rptr. at 885.

Plaintiffs' counsel contends that the policy of international comity applied by the court in the above *Volkswagenwerk* case in their enforcement of the Hague Evidence Convention should not be followed in the case at bar. Quite to the contrary, the guidelines of this international treaty must be observed not merely because it is an American judicial policy not to contravene the laws of a foreign country in a legal action involving one of their nationals, but rather because this treaty has been specifically enacted as law by the government of the United States (28 U.S.C. §1781), and as such is absolutely binding upon the courts of this State.

The required procedure was not even remotely observed or recognized by the plaintiffs herein and as such the interrogatories served upon counsel for CLUB MEDITERRANEE, S.A. are a nullity under the laws of our Nation and State.

Brief

POINT III

CLUB MEDITERRANEE, S.A. Would Violate French Criminal Law By Answering Interrogatories

French law[3] makes it a crime for CLUB MEDITERRANEE, S.A. to answer the interrogatories:

> Art. 1 bis. Subject to treaties or international agreements and to the laws and regulations in force, every person is forbidden . . . to communicate, in writing, orally or in any other manner, documents or information of an economic, commercial, industrial, financial or technical nature intended to serve as evidence in foreign judicial . . . proceedings . . . .

Law No. 80-538 of July 16, 1980 (the "Act"), as translated in Parker School Studies in Foreign and Comparative Law, Columbia University, *French Law: Constitution and Selective Legislation*, 8-49 to 50 (1981), annexed hereto as Exhibit "B", original version at II.9. Appendice au Code de Commerce, Petits Codes Dalloz (soixante-seizieme ed. 1980-81), annexed in the record (pp. 90-92). Perusal of the questions and requests for documents in the Interrogatories demonstrates that virtually all the information sought with respect to the ownership, construction and operation of his business enterprise is of an "economic, commercial, industrial, financial or technical nature" within the meaning to the Act.

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3. The issue of foreign law is raised herein in accordance with CPLR Section 4511(b).

Brief

Violation of the act by an officer or agent of CLUB MEDITERRANEE, S.A. could result in imprisonment of up to six months and a fine of 120,000 francs. Under long-standing principles of international law, CLUB MEDITERRANEE, S.A. should not be ordered by an American court to violate French law, particularly where it is the penal law of France that is at issue.

The effect of the Convention, the French criminal law, and the French Code of Civil Procedure upon discovery by a United States party directed toward a French party has been carefully analyzed in a letter from the French Ministry of Justice to the United States Department of Justice, Office of Foreign Litigation, dated March 9, 1981 (Department of State translation), (see Record, pp. 93-99), which provides:

> [T]he only two methods of investigation in French territory that may be ordered by foreign legal authorities, subject to the conditions established by these instruments, are letters of request [i.e., letters rogatory] and taking of evidence by diplomatic officers, consular agents, and commissioners (Chapters I and II of The Hague Convention of March 18, 1970, and Articles 733 *et seq.* of the new French Code of Civil Procedure.)
>
> Notwithstanding the agreement between the parties, Article I bis of the Law of July 16, 1980 prevents recourse in French territory to any other methods of investigation or procedure for taking of evidence that is considered unlawful, *particularly recourse to requests for direct disclosure of documents or information.*
>
> Moreover, Article I bis makes it possible to punish violations of the conditions established in The

> Hague Convention and in the declaration which the French government made at the time of ratification of this instrument for the execution of letters of request and the taking of evidence by commissioners.
>
> Therefore the Law of July 16, 1980, has given full effect to our relations of judicial cooperation by assuring improved implementation of the provisions of The Hague Convention of March 18, 1970 and by enabling American litigants to obtain evidence in France, by methods that are in conformity with the international commitments of our two countries, for use in judicial proceedings in the United States.
>
> (Emphasis added.)

The letter from the French Ministry of Justice nicely summarizes two salient points. First, there are avenues available for discovery, if defendants are willing to abide by them. Second, France is adamant that the prescribed procedures be followed and will impose criminal penalties upon French nationals who might otherwise be inclined to ignore the established procedures.

The legislative history of the Act suggests that it was a response to the frequent disregard by American litigants of the terms of the Convention and the reservations made by France in ratifying the Convention. *See* Herzog, *The 1980 French Law on Documents and Information*, 75 Am. J.I.L. 382 (1981).

France, like most civil law countries, subscribes to the notion that civil or commercial litigation proceedings, including discovery, should be under the control of a judicial officer and not be left

to the parties without supervision. *See, id.* at 385. The above Act puts teeth into France's approach towards compliance with a binding international agreement.

The possible imposition of criminal sanctions against CLUB MEDITERRANEE, S.A. for its production of documents and other information sought by the plaintiffs provides a further basis upon which to deny plaintiffs' demands and inquiries as set forth in the Interrogatories in question.

POINT IV

The Hague Evidence Convention Bars Discovery That is Illegal Under French Law

The Hague Evidence Convention states that if a country's laws prohibit a person of that country from divulging certain information, then the present cannot be required to produce that information:

> The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed . . . . In the execution of a Letter of Request the person concerned may refuse to give evidence insofar as he has a privilege or duty to refuse to give the evidence . . . under the laws of the state of execution . . . .

Arts. 9 and 11.

Since the international treaty in question expressly recognizes the rights of foreign corporations under the laws of their national domicile, the appellant therefore should not be required to respond to a clearly illegal form of pre-trial discovery.

Brief

POINT V

The Court Below, Respectfully, Erred In Its Interpretation and Application Of the Treaty (and Federal Law) in Question

In holding that the interrogatories in question were not barred by the Hague Evidence Convention the Court below made specific reference to its uncontested in personam jurisdiction over the defendant/appellant. It apparently derived some significance from this fact in terms of the parties' respective rights under applicable law governing pre-trial proceedings. Plaintiffs' counsel in his opposition to the motion below advanced the position, apparently adopted by Justice Parness, that by virtue of this Court's personal jurisdiction over defendant CLUB MEDITERRANEE, S.A., its rights under other, unrelated, but equally applicable law have either been waived or have evaporated of their own accord. This position is, most respectfully, erroneous and untenable.

The Hague Evidence Convention, described herein, is separate and apart from any statues or laws governing jurisdiction. It would, in fact, only become applicable once personal jurisdiction has already been established over a defendant. That CLUB MEDITERRANEE, S.A. is a French corporation is uncontested by the plaintiffs (See ¶2 of plaintiffs' complaint in Record, p. 6). As such, the provisions of the aforesaid treaty are applicable and binding upon this Court.

This is in fact the very type of case envisioned by the drafters of the Convention and the nations, including the United States, which have enacted same into law.

Brief

As a company being sued in the courts of New York, CLUB MEDITERRANEE, S.A. had every right, duty and obligation to enter an appearance and demand the particulars of the claims levied against it. The plaintiffs are residents of New York State who have chosen to utilize its legal process and as such they are subject to all of the provisions of the CPLR with respect to pre-trial discovery proceedings. The defendant is not a New York State resident. It is a foreign, international corporation which has not affirmatively sought the jurisdiction of the courts of New York and has in no way waived any of its rights by merely defending an action brought against them here. If a foreign party, subject to the terms of the Hague Evidence Convention, waives those rights by simply entering an appropriate defense, then the treaty would be meaningless and illusory. Such a catch-22 situation cannot be the intent of this law and should, respectfully, not be created or sanctioned by an affirmance of the order of Justice Parness.

The central theme underlying the contentions of plaintiffs' counsel in the litigation of this issue is that it is "unfair" that the parties herein are subject to different rules regulating pre-trial discovery. It may be considered equally unfair that the appellant, a French corporation, may be sued in the courts of this state for an incident which allegedly occurred in a *foreign country*. Nevertheless, the same principle of law which has created the availability of jurisdiction in New York State over such defendant, has also resulted in the establishment of an accepted procedure for the litigation of the case. Contrary to Mr. Dickerson's assertions below, it is the plaintiffs who are seeking the best of both worlds; jurisdiction over a foreign defendant without the statutory mandates attendant therewith.

The order of Justice Parness also cites from the aforementioned letter of the French Ministry of Justice, supra., pp. 12-13. The

order seems to interpret this letter as indicating that the Convention only applies where the discovery proceeding itself would physically take place within French territory. This requirement would of course strip the Convention of any effect since in virtually every situation opposing counsel would simply demand that the information, documents or individuals located in the defendants home country be transported to New York for discovery proceedings. Quite obviously, the intent of the Convention is to enact certain procedures for the taking of pre-trial evidence where the discovery *material* is located in said foreign country, not the discovery proceeding.

POINT VI

Summary of Law

The Hague Evidence Convention is an international treaty that has been adopted, approved and signed by the governments of both France and the United States. As such, it has become the law of our nation (28 U.S.C. §1781) and binding upon the states. This treaty established a uniform system for the taking of evidence in pre-trial discovery among signatory nations with entirely different forms of procedural law. It would, respectfully, be inequitable and unwise for this Court to ignore its significant international ramifications and reduce it to a meaningless document to be ignored at the whim of any local court in any nation at any time.

It is respectfully submitted that unless the Hague Evidence Convention is to be entirely ignored, there is no basis for an affirmance of the order of the court below.

Brief

CONCLUSION

The order of the trial court, dated January 5, 1983, should, most respectfully, be reversed.

Respectfully submitted,

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Brief

STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

MARJORIE SCHLOSSBERG DORIN and PHILIP DORIN,
Plaintiffs-Respondents,

-against-

CLUB MEDITERRANEE, S.A.,
Defendant-Appellant,

-and-

CLUB MED, INC., CELEBRITY TRAVEL SERVICE, LTD., KENT TRAVEL SERVICE, INC., SOCIETE GENERALE and NATIONAL UNION FIRE INSURANCE,

Defendants.

1. The Index Number of the case in the Court below is 4777/82.

2. The full names of the original parties are as set forth above.

3. The action was commenced in the Supreme Court, New York County.

4. The action was commenced by service of a summons and complaint on or about February 24, 1982. Issue was joined on March 26, 1982.

Brief

5. The nature and object of the action is a breach of contract action for the alleged failure to provide typhoid free accomodations.

6. The appeal is from an order made by Parness, J. and entered on or about January 17, 1983.

7. The appendix method of appeal is not being used. Appellant is proceeding upon filing a fully reproduced Record on Appeal.